

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-2016

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

GEORGE BIDERMAN, et al.,	:	
Plaintiffs-Appellants,	:	
- against -	:	
ROGERS C. B. MORTON, et al.,	:	
Defendants-Appellees,	:	Docket #74-2016
- and -	:	Calendar #292
CONSTITUTIONAL RIGHTS COMMITTEE	:	
OF KISMET,	:	
Defendant-Intervenor-	:	
Appellant.	:	

-----X

BRIEF FOR DEFENDANTS -  
APPELLEES, PETER F.  
COHALAN, CARLOS CRUZ  
AND WILLIAM SCHERMERHORN



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STATEMENT

The plaintiffs heretofore moved for a preliminary injunction against the several defendants. They initially asked for injunctive relief, pendente lite, enjoining the municipal defendants from granting changes of zone, variances, building permits, etc., and against all defendants from granting "beach buggy permits".

Since the motion was made in the Fall of last

year, and the beach buggy situation was not then urgent, the lower court decided the entirety of the motion, except that the court reserved decision as to beach buggy permits. The basis of the lower court's decision as to the relief requested against the municipalities was that the Federal Government was not engaging in "significant action" effecting the environment and therefore, the plaintiffs had failed to show any grounds for the requirement of an environmental impact statement or the granting of a preliminary injunction pending the filing of an environmental impact statement.

The Order of the district court was thereupon appealed to this Court, which sustained said Order. The plaintiffs thereafter moved, in the court below, for an injunction, pendente lite, enjoining the federal defendant, and only the federal defendant, from issuing beach buggy permits. Both the Islip defendants and the Brookhaven defendants supported the plaintiffs upon that motion, although said defendants were respondents. Although this author cannot speak with respect to the Brookhaven defendants, the Islip defendants reached their position of supporting plaintiffs' motion independently of any consultation with any of the other parties, and based solely upon their view of the law. As stated, both the Islip defendants and the



Brookhaven defendants, in their capacities as respondents on the motion, submitted briefs supporting plaintiffs' motion for a preliminary injunction enjoining the federal defendant from issuing beach buggy permits.

After a lengthy hearing, the motion was denied by the court below, whereupon the plaintiffs appealed to this Court.

The intervenors had also sought relief compelling the issuance of beach buggy permits. That application was also denied and the Islip defendants are advised that the intervenors have appealed from the denial of their application for relief, although the Islip defendants have nothing in their file that they can discover which constitutes a Notice of Appeal, or Cross-Appeal.

Pursuant to the authorization of this Court, a typewritten brief is being submitted.

#### POINT I

THE DECISION OF THIS COURT,  
UPON THE FIRST APPEAL, DOES  
NOT CONTROL THE PRESENT APPEAL.

Upon the initial motion for injunctive relief against the municipalities, the lower court found that the Federal Government had failed to prepare a master plan for the development of the National Seashore. The court de-

terminated that the Federal Government had failed to proceed affirmatively to implement the Congressional policy as set forth in the Fire Island National Seashore Act.

Measured against this inactivity, the plaintiffs contended that the municipalities should be enjoined from performing their normal municipal functions because the Federal Government had failed to implement the Congressional policy and because no environmental impact statement had been filed. In substance, the plaintiffs tried to tie the municipalities in with the Federal Government and contended that the Federal Government could not proceed to do nothing until an impact statement was filed.

The lower court very correctly held that the failure to affirmatively act to establish a master plan does not constitute "significant action" effecting the environment, and therefore, an impact statement could not be required and an injunction should not issue forth. This Court sustained the lower court's position, after the Islip defendants, by this author, submitted their brief and oral argument in opposition to plaintiffs' appeal.

The plaintiffs thereupon brought on their motion for a preliminary injunction against the Federal Government's issuance of beach buggy permits and allowing persons to

operate beach buggies on the Federal reservation. That motion was denied and the issue now appears before this honorable Court in the instant appeal.

There is an analogous case, not involving an environmental issue, but involving the question of what constitutes Federal activity. In American Broadcasting Company v. Federal Communications Commission, 191 F 2d 492, the court was faced with a situation where for ten (10) consecutive years, the FCC had issued a "special service authorization" to a particular radio station. These special service authorizations were temporary annual permits allowing the radio station to operate, pending determination of a claim of frequency infringement by another radio station. While the court recognized that the ultimate issue was the failure of the FCC to ultimately resolve the question of infringement, the court held that the annual renewal of the special service authorizations was affirmative action, affirmative decision making by the FCC which had created a semi-permanent situation.

In the instant case, the National Park Service has been issuing beach buggy permits annually and is continuing that policy. The issuance of beach buggy permits constitutes an affirmative act with substantial and serious consequences



for the environment of Fire Island.

The Islip defendants respectfully submit that the annual issuance of beach buggy permits by the Federal Government constitutes affirmative Federal action having a material effect upon the environment. It is conceded that there is no environmental impact statement filed with respect to the issuance of beach buggy permits or the conduct of beach buggy traffic. In the absence of an impact statement, the National Park Service should be enjoined from issuing beach buggy permits.

Pursuant to the lower court's request, a copy of the Islip Beach Buggy Ordinance was submitted to the said court. The Town of Islip has determined that beach buggy traffic has the effect of destroying the dunes and eroding the beaches. In other words, beach buggy traffic has the ultimate effect of destroying the very existence of Fire Island. It is the position of the Islip defendants that the Federal Government's persistence in allowing beach buggies to drive across the Federally owned property into the unincorporated areas of Fire Island, has the effect of ultimately frustrating the operation of the Islip Beach Buggy Ordinance, all without the filing of an environmental impact statement.

Although the Islip defendants are parties to this action, they have tried to assume the position of honest brokers in this proceeding, stating the law as they see it, without regard to partisan interest. It is in that context that the Islip defendants respectfully support plaintiffs' instant appeal.

CONCLUSION

PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION PRO-  
HIBITING THE FEDERAL GOVERN-  
MENT FROM GRANTING BEACH BUGGY  
PERMITS IN THE ABSENCE OF AN  
ENVIRONMENTAL IMPACT STATEMENT  
SHOULD BE GRANTED, AND THE  
PLAINTIFFS SHOULD, THEREFORE,  
BE SUSTAINED IN THE INSTANT  
APPEAL.

Dated: Islip, New York  
September 11, 1974

Respectfully submitted,

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UNITED STATES COURT OF APPEALS:SECOND CIRCUIT  
~~SUPREME COURT OF THE STATE OF NEW YORK~~  
~~COUNTY OF SUFFOLK~~

Docket

~~Index~~ No. 74-2016

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Cal. #292

AFFIDAVIT OF  
SERVICE BY MAIL

STATE OF NEW YORK )

: SS.:

COUNTY OF SUFFOLK )

FRANCENE H. BARRETT, being duly sworn, deposes and says:

That (s)he is over the age of 18 years, that (s)he is not a party to this action, and has on this 12th day of September, 1974, served upon the attorney(s) named below the document (s) hereafter set forth, by depositing a true copy thereof properly enclosed in a postpaid wrapper in a Post Office Mail Box regularly maintained by the United States Government located near the Town Hall, Islip, New York, directed to said attorney(s) at the designated address as indicated below:

DOCUMENT(S) served: Brief for Islip Defendants-Appellees

ATTORNEY

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Sworn to before me this

12th day of September, 1974.

  
Francene H. Barrett

  
NOTARY PUBLIC

CAROLYN VIGNOLA  
NOTARY PUBLIC, State of New York  
Qualified in Suffolk County  
No. 52 9465374  
Term Expires March 30, 1976